Granite State Distributors, Inc. *and* Local No. 633, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America. Case 1-CA-18691

March 8, 1983

DECISION AND ORDER

BY MEMBERS JENKINS, ZIMMERMAN, AND HUNTER

On August 23, 1982, Administrative Law Judge Stanley N. Ohlbaum issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief, and the General Counsel filed a brief in support of the Administrative Law Judge's Decision.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[1] and conclusions of the Administrative Law Judge.[2]

We agree with the Administrative Law Judge's conclusion, for those reasons that he noted and for those which follow, that Respondent violated Section 8(a)(5) and (1) of the Act by refusing to execute the collective-bargaining agreement arrived at with the Union on or about December 5, 1980.[3]

Beginning in August, Respondent's (then) president, Donald Sweeney, and the Union's business agent, Leo Kelly, met on some eight occasions to negotiate a collective-bargaining agreement. They reached agreement on many items. When, on the evening of December 5, Kelly agreed to accept Respondent's health and welfare proposal and Sweeney agreed to accept the Union's proposal for a union-administered pension plan, Sweeney told Kelly that they had "a deal." Except for the pension plan, Respondent implemented the agreed-to economic terms on December 8, and also implemented the checkoff provision. Around December 18, Sweeney informed Kelly that Respondent could not live with the union-administered pension plan, and he asked if the Union would instead agree to individual retirement accounts. Kelly said he believed he had no authority to remove an article from a contract ratified by the membership, but he promised to check this with his superiors. Later, Kelly told Sweeney that it had to be the union pension plan and not individual retirement accounts. On two occasions in February and June 1981, Kelly and Sweeney met to discuss the pension and certain other provisions. In the meantime, Kelly had reduced to writing and proffered the agreement to Sweeney for signature on April 15, 1981. Respondent has at all times since refused to execute it.

The Administrative Law Judge found that the parties had reached full agreement on December 5 and that their subsequent discussions were not inconsistent with this finding. He found that the subsequent discussions involved only Respondent's request for clarification of certain language and its request for modification of the pension provision. The Administrative Law Judge noted that the Union provided the language clarifications sought but that it refused to modify the previously agreed-to pension provision. He concluded, and we agree, that Respondent violated Section 8(a)(5) and (1) of the Act by refusing to execute the agreement reached with the Union.

Respondent excepts to the Administrative Law Judge's conclusion, arguing that the parties did not reach full agreement on December 5 and that they subsequently enaged in further negotiations. In this regard, Respondent contends that at the February 1981 meeting the parties bargained about a section of the grievance/arbitration provision; the performance of bargaining unit work by supervisors; and Respondent's leasing of equipment. Respondent contends that the negotiations resulted in the Union's agreeing to accept Respondent's proposals on these items. Further, Respondent contends that the parties negotiated concerning the term and reopening of the contract and concerning a provision regarding written notification to the Union in the event Respondent hired casual employees. Finally, Respondent contends that its refusal to sign the agreement is justified because the document proffered by the Union contains certain items which vary in material respects from those negotiated by the parties. We find these contentions are unsupported by the record and, moreover, are essentially refuted by the testimony of Respondent's own negotiator.

Thus, Sweeney's bargaining notes reveal that the only discussion of the grievance/arbitration provi-

[1] Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

[2] In agreeing with the Administrative Law Judge's recommendation that Respondent be ordered to make whole its employees and reimburse the trust fund for payments as provided for in the collective-bargaining agreement, we note that backpay and interest should be computed in the manner set forth in *Ogle Protection Service, Inc.*, 183 NLRB 682 (1970); *Florida Steel Corporation*, 231 NLRB 651 (1977); and *Merryweather Optical Company*, 240 NLRB 1213 (1979).

[3] Hereafter all dates referred to are 1980 unless indicated otherwise.

sion at the February 1981 meeting concerned a remedies section. Respondent previously had proposed this section and the Union had agreed to it in November. In February 1981, the parties merely discussed whether this section should be more appropriately placed in the no-strike rather than the grievance/arbitration provision. With respect to the provisions concerning the performance of bargaining unit work by supervisors, Sweeney admitted that he had asked Kelly only to provide a side letter explaining that the language permitted supervisors to cross a picket line and that Kelly agreed to do so. Moreover, the record also does not support Respondent's contention that at the February 1981 meeting the parties negotiated, and the Union agreed to accept, Respondent's proposal regarding the leasing of equipment. Kelly's notes reflect that the Union's proposal as to this matter was agreed to by Sweeney in November. While Sweeney testified that, at the February 1981 meeting, he made a proposal regarding this item which differed from that proposed previously by Kelly, and that Kelly said "okay," this assertion is controverted by the parties' subsequent conduct. Thus, the Union's November proposal was included in the agreement presented to Sweeney for signature in April 1981, and Sweeney initialed it "OK" on April 22, 1981, and testified that this meant there was no problem with this section. With respect to the discussion in February 1981 as to the contract's term and date of reopening, Kelly testified that these matters previously had been agreed to and that Sweeney merely asked him whether the date of reopening had been agreed to. Kelly said he assured Sweeney that it had and Sweeney raised no further objections. With respect to the contract's term, Sweeney at first testified that he had made a specific proposal which Kelly had accepted at the February 1981 meeting. However, Sweeney later admitted the possibility that the term had previously been agreed to and that he was seeking only reassurances of that from Kelly. As to the provision regarding Respondent's notifying the Union in writing of any hiring of casual employees, Sweeney's testimony, consistent with that of Kelly's, was that he objected to having to put the notice in writing. Kelly said he told Sweeney that the language had previously been agreed to and that he wanted it in the contract, but that a phone call giving notice of any hiring would be acceptable to him. Sweeney apparently agreed.

Under all these circumstances, we agree with the Administrative Law Judge and find that the February 1981 meeting involved merely discussion as to language clarification, as well as Respondent's request for modification of the pension provision, and that no further negotiations took place.

The record also does not support Respondent's further contention that certain items in the document proffered for signature vary in material respects from those to which the parties had agreed. Thus, the record reveals that when the parties met again in June 1981 to discuss the document, Sweeney at first questioned whether he had agreed to certain items, but he admitted that he was seeking essentially language clarification and that he accepted Kelly's assurances and agreed that the matters which he was questioning had been agreed to previously. Accordingly, we agree with the Administrative Law Judge and find that Respondent's refusal to execute the agreement reached with the Union was violative of Section 8(a)(5) and (1) of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, Granite State Distributors, Inc., Manchester, New Hampshire, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Failing and refusing to bargain collectively with Local No. 633, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, with respect to the rates of pay, wages, hours of employment, and other terms and conditions of employment of employees in the appropriate unit described below by refusing to execute a copy of the agreed-upon contract with the Union. The appropriate collective-bargaining unit is:

> Truck drivers, warehousemen and working foremen, both regular and part time, employed at its Manchester, New Hampshire facility; excluding all other employees, office clerical employees, guards and all supervisors as defined in the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Upon request of the Union, promptly execute and give effect as of December 8, 1980, to the collective-bargaining agreement reached with the Union on or about December 5, 1980.

(b) Make whole employees by promptly making such payments, adjustments, and perquisites as required under the foregoing collective-bargaining agreement as of December 8, 1980, with interest, in the manner set forth in footnote 2 of this Decision and Order.

(c) Upon request, bargain collectively in good faith with Local No. 633, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, as the exclusive bargaining representative of Respondent's employees in the appropriate collective-bargaining unit as set forth in said collective-bargaining agreement, with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment, and embody in a signed agreement any understanding reached; *provided, however,* that this obligation shall not affect the requirement in this Order that Respondent execute and comply with the aforedescribed collective-bargaining agreement as of December 8, 1980.

(d) Post at its premises at 333 March Avenue, Manchester, New Hampshire (or at any premises to which it may have relocated), copies of the attached notice marked "Appendix."[4] Copies of said notice, on forms provided by the Regional Director for Region 1, after being duly signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director for Region 1, in writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply herewith.

[4] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

The Act gives employees the following rights:

To engage in self-organization

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To engage in activities together for the purpose of collective bargaining or other mutual aid or protection

To refrain from the exercise of any or all such activities.

WE WILL NOT refuse to bargain collectively with Local No. 633, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, with respect to the rates of pay, wages, hours of employment, and other terms and conditions of employment of employees in the appropriate unit by refusing to execute an agreed upon collective-bargaining agreement with the Union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of their rights guaranteed them by Section 7 of the Act.

WE WILL, upon request of the Union, promptly execute and give effect as of December 8, 1980, to the collective-bargaining agreement reached with the Union on or about December 5, 1980.

WE WILL make whole employees for any loss of benefits, with interest, resulting from our failure to implement the collective-bargaining agreement reached with the Union on December 8, 1980.

GRANITE STATE DISTRIBUTORS, INC.

DECISION

PRELIMINARY STATEMENT; ISSUE

STANLEY N. OHLBAUM, Administrative Law Judge: This proceeding under the National Labor Relations Act, as amended, 29 U.S.C. § 151, *et seq.* (Act), based upon a complaint issued on July 2, 1981, by the Board's Regional Director for Region 1, growing out of charge filed on May 22, as amended on June 26, 1981, by the Charging Party Union, was litigated before me in Manchester, New Hampshire, on April 1-2, 1982, with all parties participating throughout by counsel or other representative and afforded full opportunity to present evidence and arguments, as well as to file briefs received from the General Counsel and Respondent on May 17, 1982. Records and briefs have been carefully considered.

The principal issue is whether, in violation of Section 8(a)(5) and (1) of the Act, Respondent Employer has

failed or refused to execute a fully bargained collective agreement with Charging Party Union as conceded exclusive bargaining representative of an admittedly appropriate collective-bargaining unit of Respondent's employees.

Upon the entire record and my observation of the testimonial demeanor of the witnesses, I make the following:

FINDINGS AND CONCLUSIONS

I. JURISDICTION

At all material times, Respondent has been and is a New Hampshire corporation, with its principal office and place of business in Manchester, New Hampshire, engaged in the trucking business. In its operation of that business, Respondent annually purchases and causes to be transported to New Hampshire directly in interstate commerce from places outside of New Hampshire materials and commodities, including fuel, valued in excess of $50,000.

I find that at all material times Respondent has been and is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7), and Charging Party Union a labor organization as defined in Section 2(5), of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

In August 1980, Respondent Employer and Charging Party Union entered into negotiations looking toward a collective agreement, with about seven negotiating sessions thereafter. Credited testimony of union negotiator Kelly establishes that, as alleged in the complaint, on or about December 5, 1980, the parties arrived at full agreement. Kelly's testimony to that effect is substantiated by that of Respondent's own negotiator Sweeney, who, testifying as Respondent's witness, in substance conceded as much.

(Direct examination by Mr. Baier, Respondent's counsel):

> Q. Mr. Sweeney, did you agree to accept Article 20 [i.e., "Pension"] of the General Counsel's Exhibit 2 [i.e., collective agreement] at this time?
>
> A. At which time June 16th [1981]?
>
> Q. At any time.
>
> A. On *June 16th* we were not accepting Article 20.
>
> JUDGE OHLBAUM: *Did you accept it any time other than June 16th?*
>
> THE WITNESS: *December 5th [1980], Your Honor.* [Emphasis supplied.]

(Cross-examination by Mr. Redbord, counsel for the General Counsel of the Board):

> Q. Now you didn't have this agreement, this piece of paper [i.e., collective agreement], after December 5th? Right?
>
> A. That's right.
>
> Q. Could I ask, December 5th, 1980; what is that referring to?
>
> A. That refers to the date it was discussed.
>
> JUDGE OHLBAUM: *And agreed upon? And agreed upon?*
>
> THE WITNESS: *I have to say yes, Your Honor.* [Emphasis supplied.]

Subsequent to this agreement, Respondent engaged the Union in discussion to clarify—and also to attempt to modify—the agreement. The clarifications were supplied, to Respondent's satisfaction, and no modification was agreed to. The modification sought by Respondent related to the pension plan,[1] Respondent (meanwhile seemingly with a new principal, Secotte) expressing a belated preference for a *nonunion*-administered pension plan (i.e., individual employee IRA accounts, under which no withdrawals could be made by any employee before age 69 or 69-1/2, in contrast to the previously agreed-upon union-administered plan under which retirement was available at age 49-1/2 or after 30 years of service). (During the negotiations prior to the December 5 agreement, the Union had agreed to accept a provision for an *employer*-administered health and welfare plan—in an entity in which the Employer's new principal Secotte was a trustee or official—in exchange for the Employer's acceptance of the Union's pension plan.)[2]

While it is true that a party to a collective agreement may seek to modify it during its term, the other party to the agreement is not under legal obligation to acquiesce therein, and no such attempted modification is operative unless agreed to by both sides. The Union here has simply not agreed—nor was it under obligation to agree—to the modification sought by Respondent. Respondent seemingly had second thoughts about the pension plan provision it had agreed to, perhaps in part induced by ideas of its new principal, Secotte, possibly arising from Secotte's post-agreement apprehensions, purportedly on behalf of his union-represented employees, concerning the long-range reliability of the union pension fund. Without regard to the reasons for or possible merits of those second thoughts, however, it is the fact that the parties had already agreed upon the terms of the collective agreement on or about December 5, 1980: Respondent's own negotiator and principal witness, Sweeney, himself, testified.

Direct examination by Mr. Baier, Respondent's counsel:

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[1] According to Respondent's negotiator and witness, Sweeney, apparently all other provisions of the collective agreement had or have been effectuated by the parties as of December 8, 1980.

[2] The parties agree that there is no appreciable difference in cost to the Employer between either of the plans (health and welfare; and pension) now preferred by the Employer. During the parties' post-agreement (i.e., after December 1980) discussions, the Union, in an attempt to resolve amicably the issues raised by the Employer, offered to "trade off" the previously agreed-upon pension plan provision in exchange for the Employer's relinquishing the previously agreed-upon provision for an *employer*-administered health and welfare plan (the latter at the previous insistence of the Employer—to which the Union had previously acquiesced in order to arrive at the agreement of December 5—in an entity of which the Employer's new principal Secotte was a trustee or official). Respondent, however, remained adamant in its new, post-agreement insistence that it would no longer execute the contract containing the provision for the Union's pension plan previously (i.e., on December 5, 1980) agreed to.

Q. Did you discuss these problems, or these matters that you felt had not been agreed upon, but were contained in General Counsel's Exhibit 2 [i.e., collective agreement]; did you discuss these matters with [union negotiator] Mr. Kelly?

A. Yes, I did.

Q. Can you tell us when these discussions occurred?

A. Approximately June 16th [1981].

Q. Would you briefly describe for us the nature of those discussions; what you said and what Mr. Kelly said?

A. I began by reviewing item for item those sections or provisions that I had questions on, or that I did not have notes on. And, at that point, in each instance Mr. Kelly referred to his notes and indicated that according to his notes there was an agreement on them.

* * * * *

JUDGE OHLBAUM: At this meeting of June 16, 1981 with Kelly where he consulted his own notes, did he show you his notes, or did he tell you what his notes reflected?

THE WITNESS: He told me what his notes reflected, Your Honor.

JUDGE OHLBAUM: And what did you say, if anything? What was you response?

THE WITNESS: I simply said: "Okay. All right." I accepted his notes.

JUDGE OHLBAUM: Well, did you or didn't you?

THE WITNESS: Yes, I did.

* * * * *

Q. Mr. Sweeney, did you agree to accept Article 20 [i.e., "pension"] of General Counsel's Exhibit 2 at this time?

A. At which time? June 16th [1981]?

Q. At any time.

A. On June 16th we were not accepting Article 20.

JUDGE OHLBAUM: *Did you accept it at any time other than June 16th?*

THE WITNESS: *December 5th [1980], Your Honor.* [Emphasis supplied.]

Cross-examination by Mr. Redbord, counsel for the General Counsel:

Q. Is it your testimony that, other than the items that you brought up at the February meeting and the June [1981]; all other items contained in the proposed contract that Mr. Kelly gave you on April 15th, were in fact agreed to prior to December 5th? If you don't understand the question, please say so.

A. I'm thinking. I would say yes.

* * * * *

Q. Now you didn't have this agreement, this piece of paper [i.e., collective agreement], after December 5th? Right?

A. That's right.

Q. Could I ask, December 5, 1980; what is that referring to?

A. That refers to the date it was discussed.

JUDGE OHLBAUM: *And agreed upon? And agreed upon?*

THE WITNESS: *I have to say yes, Your Honor.*

[By Mr. Redbord, resuming] Now some of these items [on your copy of collective agreement] have question marks next to them. For instance, Article 1, Section 3 has a question. Does that indicate that when you reviewed this document, you just weren't sure whether you had agreed to it or not?

A. That's correct.

Q. Would that be the same for any other item in here with a question mark?

A. That's correct.

JUDGE OHLBAUM: Was it on those items that Mr. Kelley—that you obtained assurance, if you did, or confirmation from Mr. Kelly from his notes?

THE WITNESS: Yes.

[By Mr. Redbord, resuming] As to the items that are not marked in any way; no okay and no question mark. Those items were also the ones you obtained confirmation from? Is that correct?

A. That's correct.

JUDGE OHLBAUM: And were you content to rely on Kelly's notes with regard to those matters?

THE WITNESS: Yes, Your Honor. [Emphasis supplied.]

There is thus not present here the troublesome question of whether a binding agreement has been arrived at with a clean written document to follow, or whether no binding agreement has been made until the ultimate writing itself has been formally executed. Cf. 1 S. Williston on Contracts, 3d ed., 1957, § 28 at p. 66, *et seq.* The fact that the parties continued, after they had reached agreement on December 5, 1980, to discuss some of its terms, and even to attempt to arrive at a *mutually* agreeable modification of some of them, is in no way inconsistent with the existence of the previously arrived-at agreement. It is not unusual for parties to an agreement to discuss its terms, or even to seek modification thereof, after the agreement has been arrived at.

The Act, Section 8(a)(5), declares it an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees . . . ." Section 8(d) states that, for purposes of Section 8, "to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to . . . execut[e] . . . a written contract incorporating any agreement reached if requested by either party."

Since Respondent has failed and continues to refuse to execute the agreement it made with Charging Party on

or about December 5, 1980, it has thereby violated Section 8(a)(5) and (1) of the Act.[3]

Upon the foregoing findings and the entire record, I state the following:

CONCLUSIONS OF LAW

A. Jurisdiction is properly asserted here.

B. By failing and refusing to execute the collective-bargaining agreement arrived at by and between Respondent and Charging Party Union on or about December 5, 1980, Respondent has failed and refused to bargain collectively with said Union, and continues to do so, in violation of Sections 8(a)(5) and 8(d) of the Act, and has, further, interfered with, restrained, and coerced its employees in the exercise of their rights under Section 7, and continues to do so, in violation of Section 8(a)(1) of the Act.

C. Said unfair labor practices and each of them have affected, continue to affect, and unless permanently restrained and enjoined will continue to affect commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Respondent should be ordered to cease and desist from continuing to violate the Act in the respects found, or in like and related respects, and should be required to execute and give effect to the collective agreement in question as of its designated effective date of December 5, 1980, and to post the usual informational notice to its unit employees. Respondent should also be required to make all financial adjustments, including health and welfare plan payments and satisfaction of derivative and related claims if any, as well as pension plan payments, called for by said collective agreement, as of December 8, 1980, said amounts and interest to be computed in the manner delineated in *F. W. Woolworth Company*, 90 NLRB 289 (1950), *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962), and *Florida Steel Corporation*, 231 NLRB 651 (1977), preserving and opening its books and records to the Board's agents for computation and compliance determination.

[Recommended Order omitted from publication.]

[3] In its answer, Respondent also interposed the affirmative defense that "The dispute giving rise to the complaint herein is resolvable through the grievance/arbitration provision of the collective bargaining agreement"—i.e., the very collective agreement which Respondent claims it did not agree to—and that, "Therefore, the NLRB should dismiss the complaint and defer to the arbitration process to its decision in *Collyer Insulated Wire*, 192 NLRB 837 (1971)." Although this defense is without merit, among other reasons because there is no evidence that Respondent at any time sought to avail itself of arbitration and because Respondent elected to proceed with litigation of the instant proceeding, at no time was this position or "defense" reasserted or raised during the course of the hearing here nor even in Respondent's post-trial brief.